

No. 11064

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

MADELEINE N. SHARP,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

AUG 1 1905

PAUL P. O'BRIEN,

CLERK

No. 11064

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
MADELEINE N. SHARP,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Stipulation of Facts	27
Answer to Petition for Redetermination of Deficiency	9
Appearances	1
Certificate of Clerk to Transcript of Record..	53
Decision	39
Designation of Record on Review	51
Docket Entries	1
Opinion	28
Petition for Redetermination of Deficiency....	3
Exhibit A—Notice of Deficiency	6
Petition for Review and Assignments of Error	41
Notices of Filing	46, 47, 48
Statement of Points to be Relied Upon.....	49
Stipulation of Facts with Attached Documents	10
Amended	27
Stipulation of Venue	40

APPEARANCES:

For Taxpayer:

RAYMOND M. WANSLEY

For Comm'r:

RALPH E. SMITH, ESQ.

Docket No. 110477

MADELEINE N. SHARP,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1942

Apr. 9—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 10—Copy of petition served on General Counsel.

May 11—Answer filed by General Counsel.

May 11—Request for hearing, in Los Angeles, Calif., led by General Counsel.

May 19—Notice issued placing proceeding on Los Angeles calendar. Service of answer and request made.

1943

Aug. 10—Hearing set Sept. 20, 1943—Los Angeles, Calif.

1943

Sept. 23—Hearing had before Judge Arnold on the merits. Submitted. Stipulation of facts filed. Briefs due Nov. 8, 1943, Reply Briefs Nov. 29, 1943.

Oct. 23—Brief filed by General Counsel. Served 11/6/43.

Nov. 5—Brief filed by taxpayer. 11/6/43 copy served on General Counsel.

Nov. 27—Reply brief filed by taxpayer. 11/27/43 copy served.

1944

June 27—Amended stipulation of facts filed by taxpayer.

July 7—Opinion rendered, Arnold J., Div. 12.
Decision will be entered under Rule 50.
Copies served.

Aug. 4—Computation as to deficiency filed by General Counsel.

Aug. 8—Hearing set 8/30/44 on settlement.

Aug. 21—Consent to settlement filed by taxpayer.

Aug. 22—Decision entered, Arnold, J., Div. 12.

Nov. 9—Stipulation of venue filed (Ninth Circuit).

Nov. 9—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by General Counsel.

Nov. 24—Proof of service filed by General Counsel. (Walter Ames).

Nov. 24—Proof of service filed by General Counsel (Raymond M. Wansley, C. P. A.).

1944

Nov. 24—Proof of service filed by General Counsel
(Madeline N. Sharp).

Dec. 13—Certified copy of order from Ninth Cir-
cuit extending the time to 3/19/45 to pre-
pare and deliver the record filed.

1945

Feb. 28—Certified copy of order from Ninth Cir-
cuit extending the time to 6/19/45 to pre-
pare and deliver the record filed.

May 21—Statement of points filed by General
Counsel with proof of service thereon.

May 21—Designation of portions of record filed
by General Counsel with proof of service
thereon. [1*]

United States Board of Tax Appeals
Washington, D. C.

Docket No. 110477

MADELEINE N. SHARP,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION

The above named petitioner hereby petitions for
a redetermination of the deficiency set forth by the

* Page numbering appearing at top of page of original certified
Transcript of Record.

Commissioner of Internal Revenue in his Notice of Deficiency, Symbols LA:ET:GT:SMS, dated January 12, 1942, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual with her principal office at 1425 Bank of America Building, San Diego, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 12, 1942. [2]

3. The taxes in controversy are Gift Taxes for the calendar year 1938 and in the amount of \$750.00.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing to the petitioner an exclusion of \$5,000.00 allowable under Section 504 of the Revenue Act of 1932 with regard to a gift in trust of a value of \$252,090.79 made by the petitioner in the year 1938 and returned by her upon her gift tax return for said year.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) The said gift in trust was a gift of a present interest, and the beneficiary, under the terms of the trust instrument, received the immediate unrestricted right to the use of, and the possession and enjoyment of, the income of the trust property.

Wherefore, the petitioner prays that this Board

may hear the proceeding and redetermine the petitioner's gift tax liability for the calendar year 1938.

(Signed) RAYMOND M. WANSLEY,
Certified Public Accountant,
Counsel for Petitioner. [3]

State of California

County of San Diego—ss.

Madeleine N. Sharp being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those sated to be upon information and belief, and those she believes to be true.

(Signed) MADELEINE NICHOLS
SHARP

Subscribed and sworn to before me this 6 day
of April 1942.

[Notary Seal]

(Signed) GORDON GRAY

Notary Public in and for the State and County
aforesaid. [4]

EXHIBIT A

Treasury Department
Internal Revenue Service
Los Angeles, California

January 12, 1942

Office of
Internal Revenue Agent in Charge
Los Angeles Division

Madeleine Nichols Sharp,
1425 Bank of America Building,
San Diego, California.

Madam:

You are advised that the determination of your gift tax liability for the calendar year 1938 discloses a deficiency of \$750.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of the Estate Tax Division. The signing and filing of this form will expedite the closing of your return by per-

mitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner

(Signed) By GEORGE D. MARTIN

Internal Revenue Agent in
Charge

Enclosures:

Statement.

Form of waiver. [5]

Donor: Madeleine Nichols Sharp

Calendar year 1938

STATEMENT

Gift tax year	Liability	Assessed	Deficiency
1938	\$21,763.62	\$21,013.62	\$750.00

In making this determination of your gift tax liability, careful consideration has been given to your protest dated November 15, 1941, and to your brief dated January 3, 1942.

A copy of this letter and statement has been mailed to your representative, Raymond M. Wansley, Bank of America Building, San Diego, California, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET GIFTS

Schedule A of return—	Returned	Determined
Total gifts	\$250,000.00	\$252,090.79
Less: total exclusions	5,000.00	0.00
<hr/>		
Total included amount of gifts.....	245,000.00	252,090.79
Specific exemption	40,000.00	40,000.00
<hr/>		
Net gifts	205,000.00	212,090.79

EXPLANATION OF ADJUSTMENTS

Schedule A of return—	Returned	Determined
Accrued interest on bonds trans- ferred	\$ 0.00	\$ 2,090.79
Exclusions	5,000.00	0.00

The accrued interest on the bonds transferred is included as it is considered to have been a part of the gift.

Under the terms of the trust instrument to which the gifts set forth on the donor's gift tax return are subject, none of the beneficiaries received the immediate unrestricted right to the use of, or the possession and enjoyment of, the income and/or corpus of the trust property and therefore no exclusions are allowable under Section 504 of the Revenue Act of 1932. [6]

COMPUTATION OF TAX

	Returned	Determined
Net gifts for 1938.....	\$205,000.00	\$212,090.79
Tax on total net gifts	20,700.00	21,763.62
Total tax payable for 1938.....	20,700.00	21,763.62
Amount assessed as deficiency pursuant to waiver	313.62	
Total tax assessed	21,013.62	21,013.62
Deficiency		750.00

[Endorsed]: U.S.B.T.A. Filed Apr. 9, 1942. [7]

[Title of Board and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a). Denies the allegations of error contained in subdivision (a) of paragraph 4 of the petition.

5 (a). Denies the allegations contained in subdivision (a) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL ACB

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

FRANK T. HORNER,

B. M. COON,

Special Attorneys,

Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed May 11, 1942. [8]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between Madeleine N. Sharp and the Commissioner of Internal Revenue, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated:

1. That on the 20th day of September, 1938, Madeleine N. Sharp executed an agreement between herself as donor and/or trustor and the Title Guaranty and Trust Company of the City of New York, State of New York, as trustee, for the benefit of Donald Nichols Sharp, son of Madeleine N. Sharp,

a true and correct copy of which agreement is attached hereto as Exhibit A.

2. That on the same date said Madeleine N. Sharp transferred to the Title Guaranty and Trust Company, as trustee, under said agreement, cash and securities having a fair market value of \$252,090.79. [9]

3. That Donald Nichols Sharp was born on September 9, 1922 and was sixteen years of age on September 20, 1938, the date as of which said agreement was executed.

4. That the present value of the right to receive the income from the said trust estate established by said agreement of September 20, 1938 was in excess of 5,000.00 as at September 20, 1938.

5. That the Commissioner of Internal Revenue in his letter of final determination addressed to Madeleine N. Sharp, has sought to tax the total value of said gift in trust and has refused to allow an exclusion of 5,000.00 with regard to said gift upon the grounds that the beneficiary did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or principal of the trust estate and that the gift is considered to be a gift of a future interest against which no exclusion is allowable.

RAYMOND M. WANSLEY

Counsel for Petitioner

(Signed) J. P. WENCHEL

BHN

Chief Counsel

Bureau of Internal Revenue

Counsel for Respondent [10]

EXHIBIT A

This Agreement, made, executed and delivered this 20th day of September, 1938, by Madeleine Nichols Sharp, (hereinafter called the "Donor") and Title Guarantee and Trust Company (hereinafter called the "Trustee") a corporation organized and existing under the laws of the State of New York, having its principal place of business at No. 176 Broadway, New York City, New York,

Witnesseth:

Whereas, the Donor desires to establish a trust for the purposes, and upon the terms and conditions hereinafter provided;

Now, Therefore, in consideration of the premises and of the sum of One Dollar (\$1.00) to the Donor paid by the Trustee, the Donor hereby assigns, transfers and conveys unto the Trustee, its successors and assigns, the property and securities described in Schedule "A" hereto annexed and made a part hereof, In Trust Nevertheless, for the following uses and purposes, and on the terms and conditions hereinafter set forth:

Article First: A. To hold, manage, invest and reinvest said trust estate, and to collect and receive the rents, interest, income and dividends (hereinafter referred to as income) therefrom and after paying the proper charges against the same, to apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to my said

[11] son Donald Nichols Sharp during his life. The Trustee may make any payment of any income thus applicable to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son. Any balance of income shall be accumulated until the arrival of my son Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp.

B. Upon the death of my son Donald Nichols Sharp, this trust shall terminate, and the Trustee shall transfer and pay over to and among the children and issue of deceased children of said Donald Nichols Sharp the principal of said trust fund, per stirpes and not per capita.

C. In the event that my son Donald Nichols Sharp shall die leaving no children or issue of deceased children him surviving, then the Trustee shall assign, transfer and pay over the principal of said trust fund to and among the children and issue of deceased children of my daughter, Madeleine Healy, per stirpes and not per capita.

D. In the event that my son Donald Nichols Sharp shall die leaving no children or issue of deceased children him surviving, and there are no surviving children or issue of deceased children

of my daughter Madeleine Healy, then in that event the Trustee shall assign, transfer and pay over the principal of said [12] trust fund to my daughter Madeleine Healy.

E. In the event that there are no children or issue of deceased children of my son Donald Nichols Sharp and of my daughter Madeleine Healy them surviving, and my daughter Madeleine Healy be dead, then the Trustee shall assign, transfer and pay over the principal of said trust fund to the donor and if she be dead to and among the children and the issue of deceased children of my brother, C. Walter Nichols, and the children and the issue of deceased children of my deceased brother William H. Nichols, per stirpes and not per capita.

F. In the event that there are no children or issue of deceased children of my daughter Madeleine Healy, my son Donald Nichols Sharp, my brother C. Walter Nichols and my deceased brother William H. Nichols then surviving, and my daughter Madeleine Healy be dead, and the donor be dead, the Trustee shall assign, transfer and pay over the principal of said trust fund to and among the persons then entitled under the laws of the State of New York to share in the donor's estate in intestacy.

Article Second: Any moneys or share of principal which shall in pursuance of the provisions hereof become payable to a person who at the time when payment is herein directed to be made is under the age of twenty-one (21) years, shall vest absolutely in such person and shall be his or her

property; but the Trustee is authorized and directed to hold said moneys or share until such minor arrives at the age of twenty-one (21) years, at which time the Trustee shall pay over to him or her said moneys or share. The Trustee shall during such minority administer the [13] same with all the powers, authority and discretion granted to it as Trustee and shall collect the income therefrom, and may pay or apply such part of said income or of the principal as the Trustee shall deem necessary for the support, maintenance and education of such minor without the intervention of a guardian. Any balance of income shall be accumulated until the arrival of such minor at majority, at which time the Trustee shall pay over the said accumulated income to such minor.

The Trustee may make payment of any income or principal thus applicable to the use of a minor by paying the same to the parent, guardian or other person having the care and control of such minor (without obligation to look to the proper application thereof by the person receiving it), or by expending it in such manner as the Trustee in its discretion believes will benefit such minor and may also pay to the minor such sums as the Trustee approves as an allowance.

Article Third: A. The Trustee shall have with respect to any and all property at any time held by it hereunder the following powers:

1. To retain any such property as an investment without regard to the proportion such property or property of a similar character, so held, may bear to the entire amount of the trust estate regardless

of whether such security is a legal investment for a Trustee under the laws of the State of New York.

2. To sell at either public or private sale, and to grant options to purchase, any such property either for cash or on credit or partly for cash and partly on credit; also to exchange [14] any such property;

3. To invest and reinvest in, and to acquire by exchange, such property of any character as the Trustee may deem wise, necessary or expedient, including but not being limited to, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred stocks, currency, money or real or personal property, without being limited to the class of securities in which Trustees are authorized by law or any rule of court to invest trust funds;

4. To participate in any plan of reorganization, consolidation, merger or similar plan of any corporation the securities of which constitute part of the trust estate; to consent to or oppose such plan and any action thereunder, or any contract, lease, mortgage, purchase, sale or other action by such corporation; and to deposit any portion of the trust estate with any protective reorganization or similar committee, to delegate discretionary power thereto and share in payment of the expenses and compensation thereof, and to pay any assessments levied with respect to such portion;

5. To exercise all conversion, subscription, voting and other rights of whatsoever nature pertaining to the trust estate, and to grant proxies, discretionary or otherwise, with respect thereto;

6. If at any time any part of the trust estate shall consist of any bond and mortgage on real estate, to foreclose such mortgage and buy in such real estate on such foreclosure, or take a deed thereof in lieu of such foreclosure; [15]

7. To lease any real property for such term or terms, whether five years or more or less than five years, and whether or not any such term may extend beyond the period of any trust created hereunder, without application to any court and with such options to the lessee of renewal or purchase and such covenants with respect to any improvements erected or which may be erected upon said property and upon such other terms and conditions as the Trustee may deem proper;

8. To mortgage any real property for the purpose of securing the purchase price thereof or of taking up any mortgage to which said property may at any time be subject, or of repairing or improving such real property or any part thereof or of paying any assessments or other charges thereon, or for any other purpose connected with the management of said property or with the administration of the trust estate, and to make, issue and deliver good and sufficient bonds and mortgages upon any of said property to secure the same upon such terms and conditions as the Trustee may deem proper;

9. To pay off and liquidate any mortgage or mortgages to which such real property may at any time be subject and to use any other property real or personal constituting part of the trust estate for that purpose;

10. To compromise, adjust and settle or to release upon such terms as the Trustee may deem proper, any claim which the Trustee may at any time have against any person, firm, or corporation growing out of or relating to any contract made in reference to, or injuries done upon, any real property held [16] hereunder, and if any person, firm or corporation shall at any time assert any claim against the Trustee or against any part of the trust estate, to compromise, adjust and settle any such claim upon such terms as the Trustee may deem proper;

11. Generally, to exercise as in its absolute judgment shall seem advisable for the benefit of the trusts hereby created with respect to any and all property which may at any time be in its hands or under its control as Trustee hereunder, all rights, powers and privileges of every name and nature which might or could be exercised by one owning such property absolutely and in his own right.

Article Fourth: The Trustee is also authorized in its discretion:

1. To register and hold securities or other property in the name of its nominee or in its own name individually, without any words indicating its fiduciary capacity, but the Trustee shall be liable for any loss which may result from such securities or other property being registered or held in such manner instead of in the name of the Trustee;

2. To pay ordinary and necessary expenses of the trust including reasonable attorneys' fees; and to pay all taxes, assessments, water rates and other

expenses incidental to the administration of any real property held hereunder;

3. To make any division or distribution required hereunder either wholly or partly in kind, at such values as in its discretion it may deem equitable and its determination as to the value of any such securities or other property shall be binding [17] and conclusive on all persons interested therein;

4. To make repairs and improvements to any real property and to charge the cost of such repairs and improvements wholly or partly to the trust estate or to the income thereof;

5. To appoint agents to act on behalf of the Trustee and to delegate to such agents discretionary power and to compensate such agents from the income of the trust estate;

6. To effect insurance upon any real property held hereunder and to procure insurance against public liability or such other public risks arising from the ownership of real property as may be insurable to the Trustee individually and to charge the premiums thereon wholly or partly to the trust estate or to the income thereof.

Article Fifth: All ordinary or extraordinary cash dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation shall be deemed income. All dividends payable in shares or other securities or obligations of the declaring corporation shall be considered income to the extent that they would constitute income taxable to the Trustee within the meaning of the Sixteenth Amendment

to the Constitution of the United States if not distributed by the Trustee hereunder. All dividends payable in shares or other securities or obligations of the declaring corporation not thus considered income shall be deemed principal. The Trustee shall have full power and authority to determine whether dividends payable in shares or other securities or obligations of the declaring corporation shall be deemed income or [18] principal in accordance with the standards set forth above.

Income accrued on property at the time of actual delivery of such property to the Trustee, whether or not such income is then due and payable, including dividends declared but not paid, shall be income of the trust estate. Upon the termination of any estate hereunder, income accrued but not yet due and payable on property, and income accumulated and not distributed, subject to any charges or advances against it, shall belong to the next estate.

The Trustee shall make no deductions from nor additions to income by reason of the purchase or sale of securities at a premium or discount.

The Trustee shall pay to the income beneficiary the income from any assets which may at any time constitute a part of the trust estate and which may be subject to depletion, without creating any reserve to offset the depletion of the corpus.

Where the assets of a corporation are distributed in complete or partial liquidation, the amounts thus received shall be deemed principal. All distributions of corporate assets to the stockholders, whenever made, which are designated by the corporation as a

return of capital or division of corporate property, shall be deemed distributions in complete or partial liquidation. Otherwise, the Trustee shall have full power and authority to determine whether a distribution is or is not in complete or partial liquidation.

Article Sixth: The decision of the Trustee with respect to the exercise or non-exercise by it of any discretionary [19] power hereunder, or the time or manner of the exercise thereof, made in good faith, shall fully protect it, and shall be conclusive and binding upon all persons interested in the trust estate. All powers granted to the Trustee shall apply to all property at any time held hereunder and until the actual distribution thereof.

Article Seventh: The principal and income of this trust estate shall be held by the Trustee free and clear from the control, debts, liabilities and engagements of any beneficiary hereunder and the receipts of any beneficiary shall be the sole discharge and release of the Trustee.

Article Eighth: Any corporation in which Title Guaranty and Trust Company, or any successor to it, shall be merged or with which or in which it or any successor to it shall have been consolidated, or any corporation resulting from any merger or consolidation to which it or any successor to it shall have been a party, shall succeed Title Guarantee and Trust Company, or any successor to it, as Trustee hereunder without the execution and filing of any instrument or further act of any kind.

Article Ninth: The Trustee shall be entitled to receive as compensation for its services in the administration of the trust, commissions at the rate allowed to a sole testamentary trustee under the laws of the State of New York in effect at the time that such commissions become payable. The value of any property and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. One-half of the commission on principal shall be [20] payable as and when principal is received by the Trustee and the remaining one-half shall be payable as and when any principal shall be paid out or otherwise distributed; such receiving commission to be computed at the market value of property at the time of its receipt by the Trustee and such commission for paying out to be computed at the market value of such property at the time of such payment or distribution, provided, however, that the Trustee shall not be entitled to any commission for receiving any insurance policies held in trust until the collection of the proceeds or avails thereof and shall then be entitled to commission for receiving the amount of such proceeds or avails. Commissions upon income shall be payable as and when any income is received and may be deducted by the Trustee at the time of receipt of such income, whether such income is received or distributed, and shall be computed at annual rests.

Article Tenth: The Donor reserves the right for herself or any other person to increase this trust by delivering property to the Trustee. The duties

and liabilities of the Trustee shall under no circumstances be substantially increased by virtue of the provisions of this Article Tenth except with its written consent.

The Donor reserves the right, from time to time by instrument in writing delivered to the Trustee and acknowledged in the same manner as a conveyance of real property entitled to record in New York unless acknowledgment be waived by the Trustee, to modify or alter any of the provisions of this agreement relating to the power, authority and responsibility of the Trustee [21] with respect to the administration of the trust estate; provided, however, that the Donor reserves no right to revoke this instrument, change the beneficiaries hereunder or alter the interests conferred by Article First hereof upon said beneficiaries.

Article Eleventh: Any Trustee hereunder shall have the right at any time to resign by giving written notice of its resignation to the Donor, if living; otherwise, to the beneficiary who may then be entitled to receive income. If any Trustee or substituted Trustee shall resign or otherwise become incapable of acting, a substituted Trustee may be appointed by an instrument in writing signed by the Donor, or after her death, by the beneficiary, who may then be entitled to receive income; provided, however, that any such substituted Trustee shall be a bank having trust powers or a trust company, having a capital and surplus of not less than \$10,000,000.00.

Any Trustee may be removed as such Trustee

and any other bank or trust company substituted as Trustee by delivering to and leaving with the Trustee so removed and the bank or trust company so substituted, instruments in writing setting forth that such Trustee is removed and naming such other bank or trust company substituted as Trustee hereunder; provided, however, that any such substituted Trustee shall be a bank having trust powers or a trust company having a capital and surplus of not less than \$10,000,000.00. The instruments effecting such removal and substitution shall be signed by the Donor, or, after her death, by the beneficiary who may then be entitled to receive income. Upon receipt of such instrument removing the Trustee the Trustee so [22] removed, insofar as it is able, shall do any and all acts and things and execute and deliver any and all such instruments as may be necessary or proper to render such removal effective according to its true intent and purpose. Any substituted Trustee shall have and may exercise all of the powers hereby conferred upon Title Guarantee and Trust Company, including discretionary powers.

Article Twelfth: This trust shall not take effect until the execution of this agreement by both the Donor and the Trustee, and it shall be governed and construed in all respects according to the laws of the State of New York.

In Witness Whereof, Madeleine Nichols Sharp has hereunto set her hand and seal and Title Guarantee And Trust Company has caused this instrument to be executed by its Trust Officer and its cor-

porate seal to be hereunto affixed, duly attested by its Assistant Trust Officer, all in duplicate as of the day and year first above written.

(Signed) MADELEINE NICHOLS

SHARP (L.S.)

[Seal] TITLE GUARANTEE AND
TRUST COMPANY

By (Signed) C. REGINALD OATES

Trust Officer

Attest:

(Signed) FRANK M. VOTAW

Assistant Trust Officer [23]

State of New York

County of New York—ss.:

On the 20th day of September, 1938, before me came Madeleine Nichols Sharp, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that she executed the same.

[Seal] (Signed) YOLANDA TUVO

Notary Public, Queens County. Queens Co. Clk's

No. 2621, Reg. No. 6481. N. Y. Co. Clk's No.

283, Reg. No. 9T200. Bronx Co. Clk's No. 10,

Reg. No. 47T-39. Kings Co. Clk's No. 29, Reg.

No. 9126. Commission Expires March 30, 1939.

State of New York

County of New York—ss.:

On the 20th day of September, 1938, before me came C. Reginald Oates to me known, who, being by me duly sworn, did depose and say that he resides at Westport, Conn. that he is a Trust Offi-

cer of Title Guarantee and Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Trustees of said corporation; and that he signed his name thereto by like order.

[Seal] (Signed) YOLANDA TUVO

Notary Public, Queens County. Queens Co. Clk's No. 2621, Reg. No. 6481. N. Y. Co. Clk's No. 283, Reg. No. 9T200. Bronx Co. Clk's No. 10, Reg. No. 47T-39. Kings Co Clk's No. 29, Reg. No. 9126. Commission Expires March 30, 1939 [24]

SCHEDULE "A"

Amount	Securities	Market value 9/20/38	Total value 9/20/38
\$ 7,000	City of New York reg. 4 $\frac{1}{4}$ s, 9/1/1960	111 $\frac{3}{4}$	\$ 7,822.50
10,000	City of New York 4 $\frac{1}{4}$ s, 9/1/1960.....	111 $\frac{3}{4}$	11,175.00
15,000	Gov't of Philippine Islands 5s, 2/1/1952	105 $\frac{1}{4}$	15,787.50
5,000	Central Pacific Rwy. Co. 1st ref. 4s, 8/1/1949	63	3,150.00
5,000	Canadian Nat'l Rwy. 3s, 2/15/1953	97 $\frac{1}{8}$	4,856.25
15,000	State of North Carolina Hwy. serial 4 $\frac{1}{2}$ s, 7/1/1951	117 $\frac{3}{4}$	17,662.50
2,000	City of New Orleans, La. new pub. imp. 4s, 1/1/42	103 $\frac{1}{2}$	2,070.00
10,000	Canadian Pacific Rwy. C. conv. 10 yr. 6s, 3/15/42	100 $\frac{1}{4}$	10,025.00
10,000	Canadian Nat'l Rwy Co. 20 yr. 4 $\frac{1}{2}$ s, 9/1/1951	112 $\frac{3}{8}$	11,237.50
1,000	City & County of San Francisco 4 $\frac{1}{2}$ s, 7/1/1960	118 $\frac{3}{8}$	1,183.75
4,000	City of Omaha, Neb. Sewer 5 $\frac{1}{2}$ s, 5/1/1941	110 $\frac{1}{2}$	4,420.00

Amount	Securities	Market value 9/20/38	Total value 9/20/38
\$ 1,000	City of New Orleans, La. 4½s, 1/1/41	105¾	1,053.75
15,000	State of Alabama Series C 4½s, 12/1/1938	100¾	15,112.50
12,000	City of Detroit ref. "A" Art Museum 4½s, 6/1/1947	101½	12,135.00
1,000	City of Fort Worth, Texas, 4½s, 1/1/1940	103¼	1,032.50
25,000	City of Los Angeles, Cal. 4½s, 10/1/1940	104¾	26,218.75
16,000	City of New York 4¼s, 3/1/1964	113	18,080.00
25,000	Port of New York Authority 4s, 3/1/1975	107¼	26,812.50
30,000	Triborough Bridge Authority 4s, 4/1/1977	108⅝	32,587.50
2,400	Phelps Dodge Corporation conv. 3½s, 6/15/1952	111½	2,676.00
3,000	U. S. Treasury 1⅜% notes 6/15/1941	102-5/32	3,064.69
200	shs. United Gas Improvement Co. \$5 pfd.	107⅝	21,525.00
	Cash		311.81
			<hr/> \$250,000.00

[Endorsed]: T.C.U.S. Filed Sept. 23, 1943. [26]

[Title of Tax Court and Cause.]

AMENDED STIPULATION OF FACTS

Whereas the stipulation of facts, in the above entitled matter, filed by counsel for Petitioner and Counsel for Respondent with the Tax Court of the United States under date of September 23, 1943, contains a discrepancy as to the name of the Trus-

tee of that certain trust created by the Petitioner herein on September 20, 1938, a copy of the trust instrument being attached as Exhibit A to the said stipulation of facts;

Now Therefore it is hereby stipulated by and between Madeleine N. Sharp and the Commissioner of Internal Revenue by their respective attorneys as follows:

1. The correct name of the Trustee of the said Trust created by Petitioner under date of September 20, 1938 was and is "Title Guarantee and Trust Company".

2. Said "Title Guarantee and Trust Company" was and is a corporation organized and existing under the laws of the State of New York and having its principal place of business at Number 176 Broadway, New York City, New York.

RAYMOND W. WANSLEY

Counsel for Petitioner

(Signed)

J. P. WENCHEL, ECC.,

Chief Counsel, Bureau of Internal Revenue

Counsel for Respondent

[Endorsed]: T.C.U.S. Filed Jun. 27, 1944.

[27]

[Title of Tax Court and Cause.]

Petitioner created a trust giving the income therefrom to her son for life. The trustee was to apply and pay over the trust income to the use

and for the benefit of the son, with discretionary powers during his minority as to whom payment thereof would be made. Upon the son's death, the trust terminated, the corpus to be distributed as directed by the trust indenture except to any minor beneficiaries during their minority, as to whom broad discretionary powers were vested in the trustee. The value of the son's right to receive the trust income at the time of the gift was in excess of \$5,000. Held, petitioner is entitled to a \$5,000 exclusion in determining her gift tax liability as the gift of income was a present and not a future interest.

Raymond M. Wansley, C.P.A., for the petitioner.

Ralph E. Smith, Esq., for the respondent. [28]

OPINION

Arnold, Judge: This proceeding involves a gift tax deficiency of \$750 for 1938. The issue is whether petitioner is entitled to a \$5,000 exclusion under section 504, Revenue Act of 1932. We adopt as our findings of fact the facts admitted in the pleadings and stipulated by the parties.

Petitioner's return for the period here involved was filed with the collector for the sixth district of California.

On September 20, 1938, petitioner executed an agreement between herself as donor and/or trustor and the Title Guarantee and Trust Company of the City of New York, as trustee, for the benefit of Donald Nichols Sharp, her son. On the same date she transferred to the Title Guarantee and Trustee

Company, as trustee, under the agreement, cash and securities having a fair market value of \$252,-090.79.

Donald Nichols Sharp was born on September 9, 1922.

The present value of the right to receive income from the trust estate established by the agreement of September 20, 1938, was in excess of \$5,000 at that date.

The relevant provisions of the trust indenture are as follows:

* * * * *

Article First: A. To hold, manage, invest and reinvest said trust estate, and to collect and receive the rents, interest, income and dividends (hereinafter referred to as income) therefrom and after paying the proper charges against the same, to apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to my said son Donald Nichols Sharp during his life. The Trustee may make any payment [29] of any income thus applicable to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son. Any balance of income shall be accumulated until the arrival

of my son Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp.

* * * * *

Paragraphs B, C, D, E, and F. of Article First provide that the trust shall terminate upon the death of the son and the principal of the trust shall be paid over to and among the children and issue of deceased children of Donald Nichols Sharp. If the latter died without children or issue of deceased children him surviving, the principal was distributable among the children and issue of deceased children of the donor's daughter; if the daughter had none such the principal went to her; if the daughter failed to survive, the donor became the distributee; if the donor likewise failed to survive the principal went to the children and issue of deceased children of the donor's brother; and if all the above persons failed to survive the donor's son, the principal was distributable among the persons then entitled under the laws of the State of New York to share in the donor's estate in intestacy.

Article Second of the trust indenture reads as follows:

Article Second: Any moneys or share of principal which shall in pursuance of the provisions hereof become payable to a person who at the time when payment is herein directed to be made is under the age of twenty-one (21) years, shall vest absolutely in such person and shall be his or her property; but the Trustee is authorized and directed to hold said moneys or share until such minor arrives

at the age of twenty-one (21) years, at which time the Trustee shall pay over to him or her said moneys or share. The Trustee shall during such minority administer the same with all the powers, [30] authority and discretion granted to it as Trustee and shall collect the income therefrom, and may pay or apply such part of said income or of the principal as the Trustee shall deem necessary for the support, maintenance and education of such minor without the intervention of a guardian. Any balance of income shall be accumulated until the arrival of such minor at majority, at which time the Trustee shall pay over the said accumulated income to such minor.

The Trustee may make payment of any income or principal thus applicable to the use of a minor by paying the same to the parent, guardian or other person having the care and control of such minor (without obligation to look to the proper application thereof by the person receiving it), or by expending it in such manner as the Trustee in its discretion believes will benefit such minor and may also pay to the minor directly such sums as the Trustee approves as an allowance.

Article Third enumerates the broad powers vested in the trustee with respect to any and all property at any time held by it under the trust indenture including in paragraph 11 thereof the power, generally, to exercise as in its absolute judgment shall seem advisable for the benefit of the trusts "all rights, powers and privileges of every name and nature which might or could be evercised by

one owning such property absolutely and in his own right." Article Fourth authorizes the trustee in its discretion to register and hold securities or other property in its own name or in the name of a nominee, to pay the ordinary and necessary expenses of the trusts, to make any divisions or distributions wholly or partly in kind, to make repairs and improvements and charge the cost to income or corpus, to appoint agents, and to insure the real property and charge the premiums to income or corpus. [31]

Article Fifth relates to dividends of all kinds and classifies such dividends as income or principal, to premiums and discounts on purchases or sales by the trustee, to income accrued on property delivered to the trustee, to the income from depletable assets which the trustee was required to distribute to the income beneficiary without creating a reserve to offset the depletion of the corpus, and to distributions by corporations of its assets in complete or partial liquidation. Article Fifth also provides:

* * * * *

Upon the termination of any estate hereunder, income accrued but not yet due and payable on the property, and income accumulated and not distributed, subject to any charges or advances against it, shall belong to the next estate.

Article Sixth of the trust indenture reads as follows:

Article Sixth: The decision of the Trustee with

respect to the exercise or non-exercise by it of any discretionary power hereunder, or the time or manner of the exercise thereof, made in good faith, shall fully protect it, and shall be conclusive and binding upon all persons interested in the trust estate. All powers granted to the Trustee shall apply to all property at any time held hereunder and until the actual distribution thereof.

The remaining articles of the trust indenture provided that the trustee shall hold trust corpus and income free and clear from the control, debts, liabilities and engagements of any beneficiary, for succession in interest of any corporation merged or consolidated with the Title Guarantee and Trust Company; that the trustee should receive commissions at the rate allowed to a sole testamentary trustee under the laws of New York; that the donor should have the right to increase the trust corpus and the right to modify or alter the provisions of the trust agreement relating to the [32] power, authority and responsibility of the trustee in administering the trust but no right to revoke the trust, change the beneficiaries or alter their interests; and that successor trustees should be appointed upon the resignation of the trustee or the removal thereof by an instrument in writing executed by the donor, or after her death the income beneficiaries, the substituted trustee to be a bank having trust powers or a trust company having a capital and surplus of not less than \$10,000,000.

Respondent refused to allow petitioner a \$5,000 exclusion with regard to the gift upon the grounds

that the beneficiary did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or principal of the trust estate and that the gift was a gift of a future interest against which no exclusion is allowable.

Section 504 of the Revenue Act of 1932, set forth in the margin,¹ deals with net gifts, and subsection (b) thereof excludes from "net gifts" the first \$5,000 of gifts (other than of future interest in property) made to any person by the donor during the calendar year. Article 11 of Treasury Regulations 79 (1933 Ed.) declares that "A future interest in property is any interest or estate in property, [33] whether vested or contingent, which is limited to commence in use, possession or enjoyment at some future date or time." The Supreme Court approved this regulation in *Helvering v. Hutchings*, 312 U. S. 393, 25 AFTR 1188; *United States v. Pelzer*, 312 U. S. 399, 25 AFTR 1194; and *Ryerson v. United States*, 312 U. S. 405, 25 AFTR 1191.

Respondent contends that since the trustee had sole discretion with respect to how much trust income shall be distributed to petitioner's son during

¹Sec. 504. Net Gifts.

(a) General Definition.—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts Less Than \$5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

his minority, the gift constituted a gift of a future interest and petitioner is entitled to no exclusion. He interprets Article First of the trust indenture to mean that the trustee may pay income for the use of the son during his minority to persons designated by the donor, that the trustee may make expenditures which in the discretion of the trustee will benefit the son, and that any balance shall be accumulated until the son reaches his majority.

We cannot agree with respondent's interpretation. In our opinion the trustee had no discretion with respect to paying over the trust income. After collecting the trust income and after paying the proper charges against the same the trustee was "to apply and pay over to the use and for the benefit of, *** Donald Nichols Sharp the net income therefrom during his minority, ***." The trustee acquired no discretionary powers by this language. The discretion lodged in the trustee was not whether it would "apply and pay over" or accumulate the net income, but whether it would make the required payment to the beneficiary's mother, or his guardian, or other person designated by the donor, or whether the trustee itself would expend the [34] income in such manner as would benefit the son. Such discretion gives no authority or power to the trustee to determine if it will or will not pay over as it deems proper and fit and would constitute no defense in a suit on behalf of Donald Nichols Sharp to recover the net income of the trust in the hands of the trustee. The provision for accumulating any balance of income must be construed in

the light of the other language used in Article First. In our opinion this provision was purely precautionary and constituted no limitation upon the trustee to apply and pay over the net income to the son.

The provisions of Article Second, when read with the other articles of the trust, show that the powers therein granted were effective only upon termination of the trust by the death of the life beneficiary. Any discretionary powers granted the trustee over succeeding estates would be immaterial in determining whether Donald Nichols Sharp was entitled under this indenture to the present use, possession and enjoyment of the trust income. The above quoted portions of Articles Fifth and Sixth, upon which respondent relies, constitute no limitation upon the son's right to the present use, possession and enjoyment of trust income. The one by its very terms relates only to the termination of estates; the other has to do with the good faith exercise of the trustee's discretionary powers, and, as heretofore pointed out, the trustee had no discretion in applying and paying over the trust income to Donald Nichols Sharp but only a discretion as to whom the required payment of income would be made for the use and benefit of the donor's minor son. [35]

The rule which respondent invokes and contends we should follow, namely, that where income to be distributed to beneficiaries of a trust is subject to the uncontrolled judgment and discretion of the trustees, such gifts of income are gifts of future interests, against which no exclusions are allowable, is amply supported by authorities. Mary M. Hutch-

ings, 1 T. C. 692, affirmed (CCA 5), 141 Fed. (2d) 422 (March 1944); Estate of W. W. Fondren, 1 T. C. 1036, affirmed (CCA 5,) 141 Fed. (2d) 419, (March 1944), certiorari applied for; Welch v. Paine (CCA 1), 130 Fed. (2d) 990, 30 AFTR 33; Commissioner v. Taylor (CCA 3), 122 Fed. (2d) 714, 27 AFTR 906. But the facts here afford no opportunity to apply the rule. We have no postponement of the minor's right to enjoy the net income of the trust in the uncontrolled judgment and discretion of the trustee. The donor imposed the duty on the trustee "to apply and pay over" the net income to her son, and because he was a minor she granted discretion to the trustee as to whom such payment should be made until the son reached his majority. We find support for our conclusion in Commissioner v. Lowden (CCA 7), 131 Fed. (2d) 127, 30 AFTR 229; Commissioner v. Kempner (CCA 5), 126 Fed. (2d) 853, 28 AFTR 1524; Commissioner v. Brandegee (CCA 1), 123 Fed. (2d) 58, 62, 28 AFTR 225; Smith v. Commissioner (CCA 8), 131 Fed. (2d) 254, 30 AFTR 262; Elizabeth H. Fisher, 45 B.T.A. 958, affirmed (CCA 9), 132 Fed. (2d) 383, 30 AFTR 602, and like cases, although none of these authorities is squarely in point.

Since respondent increased the amount of the gift by the accrued interest on the bonds transferred, an adjustment not in dispute, the deficiency should be redetermined in accordance herewith and

Reviewed by the Court.

Decision will be entered under Rule 50.

Sternhagen, Leech and Kern, JJ., dissent. [35]

The Tax Court of the United States
Washington

Docket No. 110477

MADELEINE N. SHARP,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 7, 1944, the respondent having filed a recomputation of tax on August 4, 1944, and the petitioner having filed an acquiescence in said recomputation on August 21, 1944, it is

Ordered and Decided: That there is no deficiency in gift tax for the calendar year 1938.

Enter:

Entered Aug 22, 1944.

(Signed) WILLIAM W. ARNOLD

Judge.

Copies served on both parties. [37]

In the United States Circuit Court of
Appeals for the Ninth Circuit

Docket No. 110477

JOSEPH D. NUNAN, Jr., Commissioner of Internal Revenue,

Petitioner on Review,

v.

MADELEINE N. SHARP,

Respondent on Review.

STIPULATION OF VENUE

Pursuant to the provisions of Section 1141 (b) (2) of the Internal Revenue Code, it is hereby agreed and stipulated that the decision of the Tax Court of the United States in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) J. P. WENCHEL, CAR

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

WALTER AMES

Counsel for Respondent on
Review.

[Endorsed]: T.C.U.S. Filed Nov. 9, 1944. [38]

[Title of Circuit Court of Appeals and Cause.]

PETITION FOR REVIEW AND ASSIGN-
MENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John T. Rogers, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent on review, Madeleine N. Sharp (hereinafter referred to as the taxpayer), is an individual with her principal office at 1425 Bank of America Building, San Diego, California; that the taxpayer filed her gift tax return for the calendar year 1938 with the Collector of Internal Revenue for the Second Collection District of New York; however, pursuant to the provisions of [39] Section 1141 (b)(2) of the United States Internal Revenue Code, it has been stipulated by the parties hereto that the decision of The Tax Court of the United States in this proceeding may be reviewed by the

United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of The Tax Court of the United States pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Nature of Controversy

On September 20, 1938, the taxpayer executed an agreement between herself as donor and/or trustor and the Title Guarantee and Trust Company of New York City (hereinafter referred to as the trustee), as trustee, for the benefit of Donald Nichols Sharp (hereinafter referred to as the beneficiary), her son, who was born on September 9, 1922. On the same date taxpayer transferred to the trustee cash and securities having a fair market value of \$252,090.79.

The present value of the right to receive income from the trust estate established by the agreement of September 20, 1938, was in excess of \$5,000.00 at that date.

On January 12, 1942, the Commissioner, in accordance with the provisions of the existing Internal Revenue laws, advised the taxpayer by registered mail that the determination of her gift tax [40] liability for the calendar year 1938 disclosed a deficiency of \$750.00. Thereafter, on April 9, 1942, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals (now The Tax Court of the United States),

and in due time the Commissioner filed his answer to said petition. This cause came on for hearing before the Honorable William W. Arnold, Judge of the Tax Court, on September 23, 1943, upon stipulation of facts of the parties. A further stipulation of facts of the parties was filed with the Tax Court on June 27, 1944. On July 7, 1944, the Tax Court promulgated its opinion herein, and on August 22, 1944, entered its decision that there is no deficiency in gift tax for the calendar year 1938.

The Tax Court, in its opinion, held that the trustee had no discretionary powers under the terms of said trust instrument as to the payment of the income therefrom to the beneficiary, and that such discretionary power as the trustee had in regard thereto was whether it would make the required payment to the beneficiary's mother (taxpayer herein, or his guardian, or other person designated by the taxpayer, or whether the trustee itself would expend the income in such manner as would benefit the beneficiary. Therefore, the Tax Court held that the taxpayer should be allowed a \$5,000.00 exclusion with regard to said gift under the provisions of Section 504 (b) of the Revenue Act of 1932.

III.

Assignments of Error

That the Commissioner of Internal Revenue, being aggrieved by [41] the opinion and decision of The Tax Court of the United States in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit

Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Tax Court, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

The Tax Court of the United States erred:

1. In holding and deciding that the gift involved herein is one of the present interest.

2. In failing to hold and decide that the gift involved herein is one of future interest.

3. In holding and finding that the trustee had no discretion with respect to paying over the trust income; and that the provisions of the trust instrument for accumulation of income were purely precautionary and constituted no limitation upon the duty of the trustee to apply and pay over the entire net income of the trust for the benefit of the beneficiary.

4. In failing to hold and find that the distribution of the income to the beneficiary of the trust involved herein was subject to the uncontrolled judgment and discretion of the trustee.

5. In holding and finding that there was no postponement of the beneficiary's right to enjoy the net income of the trust in the uncontrolled judgment and discretion of the trustee. [42]

6. In holding and finding that the donor of the trust involved herein imposed the duty on the trustee "to apply and pay over" the net income to her son, and because he was a minor she granted

discretion to the trustee as to whom such payment should be made until the son reached his majority.

7. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

8. In ordering and deciding that there is no deficiency in gift tax for the calendar year 1938.

9. In failing to order and decide that there is a deficiency in gift tax for the calendar year 1938, in the amount of \$750.00, due by the taxpayer herein.

Wherefore, the Commissioner petitions that said opinion and decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, Jr., CAR
Assistant Attorney General.

(Sgd.) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, At-
torneys for Petitioner on Review.

Of Counsel:

JOHN T. ROGERS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Nov. 9, 1944.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Walter Ames, Esq.,
1410 Bank of America Building,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of November, 1944, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated this 9th day of November, 1944.

Signed J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 14th day of November, 1944.

(Sgd.) WALTER AMES

Counsel for Respondent on
Review.

[Endorsed]: T. C. U. S. Filed Nov. 24, 1944.

[44]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Raymond M. Wansley, C. P. A.,
1425 Bank of America Building,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of November, 1944, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated this 9th day of November, 1944.

Signed J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 14 day of November, 1944.

(Sgd.) RAYMOND M. WANSLEY

For Respondent on Review.

[Endorsed]: T. C. U. S. Filed Nov. 24, 1944.

[45]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Madeleine N. Sharp,
1425 Bank of America Building,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of November, 1944, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated this 9th day of November, 1944.

Signed J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 17 day of November, 1944.

(Sgd.) MADELEINE NICHOLS
SHARP

Respondent on Review.

[Endorsed]: T. C. U. S. Filed Nov. 24, 1944.

[46]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE
RELIED UPON

Now Comes the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In holding and deciding that the gift involved herein is one of present interest.

2. In failing to hold and decide that the gift involved herein is one of future interest.

3. In holding and finding that the trustee had no discretion with respect to paying over the trust income; and that the provisions of the trust instrument for accumulation of income were purely precautionary and constituted no limitation upon the duty of the trustee to apply and pay over the entire net income of the trust for the benefit of the beneficiary.

4. In failing to hold and find that the distribution of the income to the beneficiary of the trust involved herein was subject [47] to the uncontrolled judgment and discretion of the trustee.

5. In holding and finding that there was no postponement of the beneficiary's right to enjoy the net income of the trust in the uncontrolled judgment and discretion of the trustee.

6. In holding and finding that the donor of the trust involved herein imposed the duty on the trustee "to apply and pay over" the net income to her son, and because he was a minor she granted discretion to the trustee as to whom such payment should be made until the son reached his majority.

7. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

8. In ordering and deciding that there is no deficiency in gift tax for the calendar year 1938.

9. In failing to order and decide that there is a deficiency in gift tax for the calendar year 1938, in the amount of \$750.00, due by the taxpayer herein.

(Sgd.) SAMUEL O. CLARK, Jr., CAR

Assistant Attorney General

J. P. WENCHELL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within Statement of Points to be relied on is hereby admitted this 4th day of December, 1944.

(Sgd.) WALTER AMES

Attorney for Respondent on
Review

[Endorsed]: T. C. U. S. Filed May 21, 1945.

[48]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of the Tax Court of the United
States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Tax Court.
2. Pleadings before the Tax Court:
 - (a) Petition, together with annexed Exhibit A (Notice and Statement of Deficiency.)
 - (b) Answer
3. (a) Stipulation of Facts, together with attached documents filed with the Tax Court on September 23, 1943.
 - (b) Amended Stipulation of Facts filed with the Tax Court on June 27, 1944.
4. Opinion of the Tax Court promulgated July 7, 1944.
5. Decision of the Tax Court entered August 22, 1944. [49]
6. Petition for Review, together with Proof of

Service of notice of filing petition for review and of service of copy of petition for review.

7. Stipulation of venue.

8. Statement of points to be relied upon.

9. Any and all orders made by the Court with respect to enlargement of time for the preparation and transmission of the record on review.

10. This designation of portions of record, proceedings, and evidence to be contained in the record on review.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Sgd.) SAMUEL O. CLARK, Jr., CAR

Assistant Attorney General

Signed J. P. WENCHEL, CAR

Chief Counsel

Bureau of Internal Revenue

Service of a copy of the within Designation of Portions of Record, etc., is hereby admitted this 4th day of December, 1944.

(Sgd.) WALTER AMES

Attorney for Respondent on
Review.

[Endorsed]: T. C. U. S. Filed May 21, 1945.

[50]

The Tax Court of the United States
Washington

Docket No. 110477

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

MADELEINE N. SHARP,

Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 50, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above number and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 25 day of May, 1945.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the
United States.

[Endorsed]: No. 11064 United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Madeleine N. Sharp, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed May 28, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.